

ALASKA STATE LEGISLATURE
SENATE RESOURCES STANDING COMMITTEE

April 8, 2022

3:34 p.m.

MEMBERS PRESENT

Senator Peter Micciche, Vice Chair
Senator Click Bishop
Senator Gary Stevens
Senator Natasha von Imhof
Senator Jesse Kiehl
Senator Scott Kawasaki

MEMBERS ABSENT

Senator Joshua Revak, Chair

COMMITTEE CALENDAR

SENATE BILL NO. 227

"An Act relating to state ownership of submerged land within and adjacent to federal areas; and providing for an effective date."

- HEARD & HELD

SENATE BILL NO. 228

"An Act requiring the designation of outstanding national resource water to occur only by statute; relating to the management of outstanding national resource water by the Department of Environmental Conservation; and providing for an effective date."

- HEARD & HELD

SENATE BILL NO. 177

"An Act relating to microreactors."

- BILL HEARING CANCELED

PREVIOUS COMMITTEE ACTION

BILL: SB 227

SHORT TITLE: STATE OWNERSHIP OF SUBMERGED LAND

SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

03/11/22 (S) READ THE FIRST TIME - REFERRALS
03/11/22 (S) RES
04/08/22 (S) RES AT 3:30 PM BUTROVICH 205

BILL: SB 228

SHORT TITLE: OUTSTANDING NAT'L RESOURCE WATER
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

03/11/22 (S) READ THE FIRST TIME - REFERRALS
03/11/22 (S) RES
04/06/22 (S) RES AT 3:30 PM BUTROVICH 205
04/06/22 (S) Scheduled but Not Heard
04/08/22 (S) RES AT 3:30 PM BUTROVICH 205

WITNESS REGISTER

BRENT GOODRUM, Deputy Commissioner
Department of Natural Resources
Anchorage, Alaska

POSITION STATEMENT: Presented a PowerPoint to introduce SB 227.

JIM WALKER, Section Manager
Public Access Assertion and Defense
Division of Mining, Land, and Water
Department of Natural Resources
Anchorage, Alaska

POSITION STATEMENT: Presented a PowerPoint to introduce SB 227.

JESSIE ALLOWAY, Solicitor General;
Statewide Section Supervisor
Opinions, Appeals, and Ethics Section
Civil Division
Department of Law
Anchorage, Alaska

POSITION STATEMENT: Provided invited testimony on SB 227.

CHRISTINE HUTCHISON, Representing Self
Kenai Peninsula, Alaska

POSITION STATEMENT: Testified in support of SB 227.

RANDY BATES, Director
Division of Water
Department of Environmental Conservation
Juneau, Alaska

POSITION STATEMENT: Introduced SB 228.

LINDSEY BLOOM, Campaign Strategist
SalmonState
Juneau, Alaska

POSITION STATEMENT: Testified in opposition to SB 228 to avoid politicizing the process.

AARON BRAKEL, Inside Passage Waters Program Manager
Southeast Alaska Conservation Council
Juneau, Alaska

POSITION STATEMENT: Testified in opposition to SB 228 because he believes in a scientific community-based process to make Tier 3 determinations.

ACTION NARRATIVE

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VICE CHAIR PETER MICCICHE called the Senate Resources Standing Committee meeting to order at 3:34 p.m. Present at the call to order were Senators Kiehl, Kawasaki, Stevens, and Vice Chair Micciche. Senator von Imhof arrived shortly thereafter. Senator Bishop arrived as the meeting was in progress.

SB 227-STATE OWNERSHIP OF SUBMERGED LAND

[3:35:38 PM](#)

VICE CHAIR MICCICHE announced the consideration of SENATE BILL NO. 227 "An Act relating to state ownership of submerged land within and adjacent to federal areas; and providing for an effective date."

VICE CHAIR MICCICHE invited Mr. Goodrum and Mr. Walker to present the bill.

[3:36:37 PM](#)

BRENT GOODRUM, Deputy Commissioner, Department of Natural Resources, Anchorage, Alaska, stated that SB 227 principally relates to identifying and codifying state submerged lands within federal areas. The committee's actions on this bill could be the most impactful regarding how Alaskans understand and can fully realize their hard-earned right achieved at the time of statehood. When Alaska became a state in 1959, it became entitled to all incidences of ownership in its navigable rivers and lakes, yet it is effectively deprived of clear title under the equal footing doctrine. Nonetheless, the state doggedly presses forward to assert that these rights are worth fighting for 63 years later.

MR. GOODRUM stated that the current status quo of uncertainty and ambiguity of ownership, management, and control of the state's navigable water bodies is not in Alaska's best interest. The state has patiently waited for the federal authorities to make their declarations known regarding the navigability of Alaska's water bodies. He offered his view that the time has come for the state to decisively take action to identify and codify the navigable rivers and lakes for future generations of Alaskans and its visitors, so they confidently know who has ownership, management, and control. The state ought to be able to fully identify and manage its property.

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JIM WALKER, Section Manager, Public Access Assertion and Defense, Division of Mining, Land, and Water, Department of Natural Resources (DNR), Anchorage, Alaska, began a PowerPoint on SB 227. He stated that the issue is straightforward but has become needlessly complicated.

MR. WALKER paraphrased the bullet points on slide 2, The Navigable Waters Issue.

[Original punctuation provided.]

- Alaska holds an estimated 800,000 miles of navigable rivers.
- Alaska holds an estimated 30 million acres of navigable lakes.
- Alaska owns the submerged lands beneath every navigable in-fact river and lake, and beneath tidally influenced waters in the state--unless a valid pre-statehood withdrawal EXPLICITLY defeats state title.
- In Federal Conservation System Unit areas created in Alaska post-statehood, the submerged lands beneath navigable-in-fact and tidally influenced waters are state-owned lands.

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MR. WALKER reiterated that the equal footing doctrine, also known as equality of the states, is the principle in US constitutional law that all states admitted to the Union since 1789 enter on equal footing with the original 13 colonies already in the Union.

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MR. WALKER reviewed slide 3, Federal Areas Where SOA Owns Submerged Lands, which shows a sampling of some post-statehood withdrawals where the state of Alaska owns the submerged lands.

National Park Service: Noatak National Preserve (NPr), Kobuk Valley National Park (NP), Bering Land Bridge NPr, Denali National Park and Preserve (NPP) (ANILCA additions), Wrangell-St. Elias NPP, Glacier Bay NPP, Katmai NPP, Kenai Fjords NP, Gates of the Arctic NPP, Lake Clark NPP, Yukon-Charley Rivers NPr, etc.

U.S. Fish and Wildlife Service: Becharof National Wildlife Refuge (NWR), Innoko NWR, Izembek NWR, Kanuti NWR, Kenai NWR, Kodiak NWR, Koyukuk NWR, Nowitna NWR, Selawik NWR, Tetlin NWR, Togiak NWR, Yukon Delta NWR, Yukon Flats NWR, etc.

U.S. Forest Service: Tongass National Forest, Chugach National Forest

Bureau of Land Management: Beaver Creek Wild and Scenic River (WSR), Birch Creek WSR, Fortymile River WSR, Gulkana River WSR, Unalakleet River WSR, Delta River WSR, etc.

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MR. WALKER paraphrased the bullet points on slide 4, Status of Efforts to Clear Title 1959 to Present.

The federal government acknowledges Alaska's clear title to its submerged lands beneath navigable-in-fact and tidally influenced rivers and lakes in only:

- Only 9 percent of 800,000 river miles of submerged lands under state-owned rivers.
- Only 16 percent of 30,000,000 acres of submerged lands under state-owned lakes.

MR. WALKER related that clearing the title will take hundreds of years and tens of millions of dollars at this rate.

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MR. WALKER reviewed slide 5, Sturgeon v. Frost, 136 S. CT. 1061 (2016), 139 S. CT. 1066(2019).

US Supreme Court rules unanimously federal regulations do not supersede SOA ownership and management of navigable waters in ANILCA CSUs.

MR. WALKER stated that SB 227 builds on the Sturgeon v. Frost decision by applying it statewide to other federal CSUs.

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MR. WALKER reviewed slide 6, The Navigability Phase of the Initiative, which depicted a series of assertions, shown in ovals or bubbles that fit in with the "Unlocking Alaska Initiative" that began a year ago with phase one. He reviewed several assertions:

Intensify quiet title litigation against the federal government

Assert state management of submerged lands in federal areas.

Legislatively codify state-owned navigable waters in federal areas.

MR. WALKER stated that SB 227 builds on work his section of DNR has undertaken over the past year to analyze federal areas throughout Alaska to identify navigable tidally-influenced waters. SB 227 includes 1,873 rivers and lakes within National Park Service (NPS) and Tongass National Forest areas in Alaska. He indicated that if SB 227 were to pass, he would come before the legislature for several years to satisfy the reporting requirement in SB 227. He noted that the next phase would increase the list to include navigable waters, rivers, and lakes within the Chugach National Forest and US Fish and Wildlife Service (USF&WS) areas.

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MR. WALKER read slides 7 and 8, Proposed Codification Legislation.

[Original punctuation provided.]

- Codifies SOA ownership, management and control of navigable waters and submerged lands within federal areas not covered by a valid pre-statehood withdrawal explicitly defeating state title.

- Sets forth specific navigable waters and submerged lands in federal areas statewide belonging to SOA.
- Sets forth example "susceptibility" criteria derived from caselaw to guide in navigability determinations.

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MR. WALKER stated that this mirrors the navigable waters in the RS 2477 [Revised Statute 2477 (Section 8 of the Mining Act of 1866)] upon which this bill is based., so the federal government and the general public relying on the map of navigable water or referencing the statutes [AS 38.04] will know precisely where state or federal property lies. The bill also sets forth basic susceptibility criteria derived from the case law to guide navigability determinations made by DNR.

- **Proposed statute contains an annual reporting requirement**
 - FIRST PHASE: All NPS areas statewide and Tongass National Forest.
 - SECOND PHASE: USFWS refuges and Chugach National Forest.
 - THIRD PHASE: Remaining USFWS refuges and BLM lands.
 - FOURTH PHASE: Ongoing process of clarification, modification and amendment.
- Framework for proposed statute is based upon RS 2477 ROW codification project of 1990s [AS 19.30.400].

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MR. WALKER noted that slides 9 - 12 relate to the sectional analysis of the bill, but he would not cover them at this time.

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MR. WALKER advanced to slides 12 and 13, State-Owned Navigable Waters Federally Acknowledged to Date and State-Owned Navigable Waters After Proposed Codification, which consisted of two maps of the State of Alaska.

MR. WALKER indicated that the two maps provide an overall sense of the areas addressed by the bill. He said he was unsure why the federal government was reticent to acknowledge state ownership. He surmised that the federal government may not want

in-holdings within federal land to co-manage or have concurrent land management.

MR. WALKER explained that slide 12 is color-coded, showing the navigable and undetermined waters, and slide 13 shows the state-owned navigable waters after the passage of SB 227.

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MR. WALKER advanced to slide 14, Noatak NP/Kobuk Valley NP Federally Acknowledged Navigable Waters to Date, which shows the Noatak National Preserve in tan and the Kobuk Valley National Preserve in green. The navigable rivers and waterways are shown in blue, the undetermined ones in pink, and the conflicts in blue and pink combined.

MR. WALKER reported that the only rivers the federal government has acknowledged as navigable within the two large preserves are a portion of the Noatak River in the tan area and the Kobuk River depicted in the green area on the map. He noted every river shown in blue is identified in the 1,873 rivers and lakes defined within the statute.

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MR. WALKER advanced to slide 15, Noatak NP/Kobuk Valley NP Navigable Waters after Codification, which shows the increased state-owned navigable waters were SB 227 to pass. He directed attention to the undetermined areas as depicted in pink, noting that DNR took a conservative approach when making determinations because the public relies on them when traveling on navigable waters, whether motorized or non-motorized vessels are allowed, and whether state or federal laws apply. However, he stated that if DNR litigated the navigable rivers, it would move those lines further into the headwaters.

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SENATOR VON IMHOF joined the meeting.

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VICE CHAIR MICCICHE directed attention to the undetermined waterways shown in pink on slide 15, Noatak NP/KOBUK VALLEY NP. He wondered whether the waterways listed as undetermined were ones that DNR had deemed as not navigable.

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MR. WALKER answered no. He said that in this first wave of legislation, the undetermined waterways depicted in pink were waterways that the department has not yet identified as

navigable waters. He stated that with the initial bill, DNR has substantially enhanced the inventory of state waters. DNR is reserving judgment on the upper headwaters to a later date.

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SENATOR KAWASAKI asked whether DNR set a confidence level or used technical information to make the determination.

MR. WALKER answered that DNR applied a strict methodology, using a group of technical experts within his section in the Division of Mining, Land, and Water, who examined aerial imagery, historical accounts, and other proof that would be considered in quiet title litigation. He indicated that the technical experts were confident in their determinations. He said DNR would stand behind their navigable water determinations and allow the public to access the waterways.

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MR. WALKER advanced to slide 16, Proposed Legislation.

Alaska's Ownership of Submerged Lands beneath Navigable in-fact and Tidally Influenced Rivers and Lakes is One of the Fundamental Promises of Statehood.

It's been 62 years. It is time for the Federal Government to keep its promise to the State of Alaska. SB 227 is a BOLD step in that direction.

MR. WALKER reiterated that SB 227, which is phase one, more accurately codifies what the state truly owns within federal areas statewide. SB 227 is phase one of the project. The goal is for DNR to make determinations to identify lands that belong to the state, bringing clarity to title to state lands within federal lands.

MR. WALKER urged members to pass SB 227.

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SENATOR STEVENS asked how DNR would enforce the state's rights with the federal government.

MR. WALKER answered that the federal government's position has been vague, that maybe it is or is not state navigable water, so the federal government retains possession. That position has made it difficult for the state to assert its ownership in federal court. However, this bill would assert state ownership and force the federal agencies to acknowledge or dispute the

state's claims, allowing the state to litigate. He provided an example to illustrate his point. The federal agencies have been issuing permits precluding operators from doing certain things on state submerged lands. Several operators applied for permits this past year for a mooring buoy or boat storage at Crescent Lake on state submerged land. It led to a painstaking navigability determination and ultimately the state issued the permit. The federal agencies responded that the state shouldn't issue the permits.

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VICE CHAIR MICCICHE invited Ms. Alloway to testify.

[4:02:58 PM](#)

JESSIE ALLOWAY, Solicitor General; Statewide Section Supervisor, Opinions, Appeals, and Ethics Section, Civil Division, Department of Law, Anchorage, Alaska, emphasized that the state should move away from asking the federal government for permission to manage state-owned lands. The equal footing doctrine transferred these lands as a matter of law at the time of statehood. The state does not need a quiet title or a recordable disclaimer of interest, but in the past, Alaska took the position that it was required to manage state-owned land. She stated that the Sturgeon decision [Sturgeon v. Frost, 136 S. CT. 1061 (2016), 139 S. CT. 1066(2019)] shifted the dynamic and made it clear that navigable waterways are not within federally managed CSUs. This legislation fills a gap that has always benefitted the federal government. She agreed with Mr. Walker that the federal land managers would often not decide whether a waterway is navigable. SB 227 would indicate that per Sturgeon, DNR has identified this as a navigable waterway, and state management and rules will apply. If the federal land managers disagree with DNR's navigability determination, the onus is on them to make a determination, which could be litigated. The state would manage its state-owned lands if federal land managers agreed.

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SENATOR KIEHL referred to Mr. Walker's Crescent Lake mooring buoy and boat storage issues in 2021. He asked whether the state would be precluded from litigating if the federal government had responded that the state could not issue a permit.

MS. ALLOWAY answered that the state could not have litigated the matter because there was no case or controversy since the federal government did not take a solid position on ownership. She explained that if the federal government had responded by

saying the state could not issue permits for mooring buoys, she would interpret that to mean they were asserting land ownership. At that point, either party could file a quiet title action in court.

[4:07:09 PM](#)

VICE CHAIR MICCICHE asked whether the passage of SB 227 would allow the state to go to court and assert state ownership. He surmised that the federal government would likely challenge some of the navigable waterways.

[4:08:04 PM](#)

MS. ALLOWAY answered that is correct. She related her understanding that DNR had identified the navigable waterways and is confident that they are navigable in fact. She opined that the federal government would not challenge many navigable waterway determinations but reluctantly accept them. Some disputes might need to be litigated. She stated that DNR was currently litigating several cases hoping to answer those questions. As more claims are litigated, the state will better understand the ownership of the smaller waterways.

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VICE CHAIR MICCICHE referred to page 5, line 15, Plenty Bear Creek. He stated that DNR believes that there is a point in Plenty Bear Creek that the state believes is navigable, and there was a point where it becomes headwaters. He asked if DNR had an idea of when the creek becomes non-navigable.

MR. WALKER answered yes. He stated that Plenty Bear Creek has a number assigned to it, number 10, which correlates to the official state navigable waters map. He noted that this is on the Alaska map program. The user can drill down with increasing specificity, focus on the creek, and determine when the navigability changes from exceptionally high to something else. He did not recall specifically, but typically there are natural features such as a landing strip or some historical account the department used to make the determination.

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SENATOR KIEHL referred to Sections 6 and 7 of the bill, which define terms used in determining navigability. He wondered if any of these were in question or if these terms are well-established case law. He asked how contentious these definitions were.

[4:12:27 PM](#)

MS. ALLOWAY responded that the federal government may still contest the definitions, even though DNR pulled them from case law. For example, the Gulkana River was litigated in the 1980s. In that case, the Ninth Circuit Court of Appeals (Ninth Circuit) opined that if a person could float an inflatable raft down that waterway to fish, it was sufficient commercial use to establish that it was a highway of commerce.

MS. ALLOWAY noted that in current litigation, attorneys continue to argue whether an inflatable raft is a customary and traditional watercraft. She stated that she was confident in reviewing this legislation that everything in it is supported by federal case law, either by the Ninth Circuit or the US Supreme Court. However, her hesitancy in responding is because the federal government could likely contest whether it's true.

MR. WALKER added that all these definitions, except for federal areas, could be found elsewhere in statute. For example, the Alaska Department of Fish and Game may use the term ordinary high water mark or mean high water line. He stated that these definitions are similar and primarily mirrored in AS 38.04.

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SENATOR KIEHL agreed with the deputy commissioner, the section chief, and the assistant attorney general that the second Sturgeon case said what it said. He said he was trying to figure out what SB 227 effectively does legally. He referred to the ovals on slide 6.

Legislatively codify state owned navigable waters in federal areas.

SENATOR KIEHL asked if the bill doesn't pass, whether the department will continue to move forward with the assertions.

MR. WALKER answered that the department intends to move forward with all the assertions in the ovals on the slide. He emphasized that SB 227 is important because it would clearly assert Alaska's ownership of these lands. The bill and the map of navigable waters could help clear up anything murky. He agreed that DNR's efforts wouldn't come to a standstill, and the department would continue to move forward if the bill didn't pass. However, it would be easier if the bill were to pass because it asserts state ownership. He referred to the Ninth Circuit in the Black River decision. The court used the expression "a dog in the manger." The Ninth Circuit Court of Appeals opined that the federal government, in many respects,

seemed to behave like a dog in the manger, where the dog guards the food trough and won't let allow other animals have access. The dog doesn't eat the food, but it won't allow other animals access.

[4:17:44 PM](#)

MR. WALKER offered his view that that is what the federal government does, through inaction, by being vague, that maybe it's navigable water and maybe it's not. This frustrates the state's ability to fully realize state ownership granted at statehood. He reiterated that SB 227 would help make the state's case of asserting ownership, management, and control.

[4:18:24 PM](#)

SENATOR KAWASAKI related that he reviewed definitions from Washington State and the US Army Corps of Engineers for "ordinary high water mark," which were similar but different. He asked whether that was a term of art or if that language could be litigated.

MR. WALKER answered that navigability means different things depending on the purpose. For instance, the US Coast Guard would be concerned with boating safety. However, for DNR's purposes, the definitions in AS 38.04 relate to navigability for title purposes or who owns the land. The bill uses definitions from case law on navigability for title but not used by Environmental Protection Act, the USCG, or other navigability purposes.

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VICE CHAIR MICCICHE noted that he related to the "dog in the manger" expression, but the Alaska National Interest Lands Conservation Act (ANILCA) defines those rights. The state was successful in the Sturgeon case for the Nation River in the Yukon Charley Preserve in 2007, so the state has case law. He wondered at what point DNR would have sufficient evidence or cause to litigate, negating the necessity for a bill to assert state ownership for each navigable body of water, stream, or creek. He asked how many bills or litigation costs are necessary before the state has sufficient case law that proves ANILCA provides adequate standing for the state to manage its navigable waters.

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MS. ALLOWAY said she could not answer that question. She offered her view that determining ownership of navigable waters in Alaska is a federal task, so the legislature would not impact what that task means in the federal court. However, SB 227

informs the federal government and the public that in situations where the federal government or the state has expressly said who owns what, the state owns the navigable waters. She stated that the Sturgeon case found that the federal government cannot subsume submerged lands within its CSUs. SB 227 shifts the burden to the federal government to decide whether it will litigate to defend federal ownership. Otherwise, the state must continue obtaining federal government permission to manage state lands, which gives the federal government substantial power.

MS. ALLOWAY stated that since the federal government often will not take a position on who owns the land, the state has two options: litigate or go through the Recordable Disclaimer of Interest (RDI) process. She explained that the state needs a case of controversy in order to litigate. The Ninth Circuit's "dog in the manger" analogy informed the federal government that if it doesn't take a position, the state can't litigate.

MS. ALLOWAY reviewed the second option, the RDI process, in which the state files an RDI application and pays the federal government to investigate whether the land is state-owned. Often the federal government holds the application for 5 to 10 years on big rivers, such as the Kuskokwim or the Stikine, without taking action. She offered her view that SB 227 would place the burden on the federal government in disputes over state-owned land to justify its ownership.

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VICE CHAIR MICCICHE characterized DNR's assertive actions on submerged lands as "poking the bear." He suggested that the public and federal government view Alaska differently than they did in 1959. He asked whether the risk of Congress amending ANILCA might make this expensive, annoying, inefficient problem permanent.

MS. ALLOWAY answered that while she cannot predict what Congress will do, she did not envision any substantial risk because the federal government cannot change what the state owns. The US Constitution and the equal footing doctrine in the Submerged Land Act granted the state ownership of its submerged lands. She offered her belief that if the federal government took the state's submerged lands, it would be taking, which requires just compensation. She acknowledged that the federal government could attempt to amend ANILCA, Section 103(c), to broaden its powers, asserting that it can manage these lands within the internal boundaries of its CSUs. She envisioned that the state could raise numerous legal questions because ANILCA was a grand

compromise. It would raise issues, including what the state would need in return for taking some of its rights away.

4:25:18 PM

SENATOR KIEHL directed attention to the retroactivity clause in SB 227 that goes back to January 3, 1959, the date of statehood. He agreed Alaska owns its navigable waters. He referred to Dredge Lakes near the Mendenhall Lake and US Forest Service (USFS) infrastructure. He asked whether this bill would provide authority for the state to assert that the USFS must acquire a permit going back to the date of construction.

MR. WALKER answered yes. He stated that DNR has requested that the Department of the Interior provide an inventory of all federal infrastructure constructed on state lands since the federal government did not comply with state permitting requirements. Although DNR will not assess permitting fees, DOI must go through the state's permitting process for any federal infrastructure on state lands. Secondly, the federal government has issued permits for groups to engage in certain activities on state lands for scientific or other reasons. The state informed the federal government that its permittees must obtain state permits for those activities. DNR has offered to work with DOI to determine whether federal or state regulatory authority applies to Alaska's federal and state lands. For example, this might mean a person needs a permit for any activities conducted above the high water line. Still, activities conducted below the high water line require compliance with state law. He reported that Mr. Goodrum has participated in biweekly meetings with federal counterparts to bring federal infrastructure on state lands into compliance.

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SENATOR KIEHL offered his view that contacting those conducting new or ongoing activities makes sense. Still, he wondered about the cost of reaching back to statehood versus looking forward. He offered his view that it might make more sense for DNR to put its efforts into navigability determinations for navigable lakes or streams. He expressed concern about the effective date regarding the state's priorities.

4:30:10 PM

VICE CHAIR MICCICHE opened public testimony on SB 227.

4:30:45 PM

CHRISTINE HUTCHISON, representing self, Kenai, Alaska, spoke in support of SB 227. She said she had been a resident since 1972.

She offered her belief that this bill is long overdue. She said she listened to attorneys discussing the importance of defining navigability last week, but the federal government does not wish to define it. She offered her support for the state to move forward with the assertions in the ovals [listed on slide 6]. She suggested that the legislature should introduce a bill for each assertion, and the legislature should focus on this issue rather than arguing about the permanent fund dividend or election integrity. She stated that this bill is the first step to affirming that Alaska is a sovereign state. She urged members to pass SB 227.

[4:34:31 PM](#)

SENATOR BISHOP joined the meeting.

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VICE CHAIR MICCICHE closed public testimony on SB 227.

VICE CHAIR MICCICHE held SB 227 in committee.

SB 228-OUTSTANDING NAT'L RESOURCE WATER

[4:35:06 PM](#)

VICE CHAIR MICCICHE announced the consideration of SENATE BILL NO. 228 "An Act requiring the designation of outstanding national resource water to occur only by statute; relating to the management of outstanding national resource water by the Department of Environmental Conservation; and providing for an effective date."

[4:35:41 PM](#)

RANDY BATES, Director, Division of Water, Department of Environmental Conservation, Juneau, Alaska, paraphrased prepared remarks:

[Original punctuation provided.]

Outstanding Natural Resource Waters, ONRWs or Tier 3 waters, are defined as waters of "of exceptional recreational or ecological significance" which shall be "maintained and protected" from degradation in perpetuity. A Tier 3 designation of a waterbody bestows the highest level of water quality protection under the federal Clean Water Act and restricts a wide range of activities on these waters as well as on adjacent lands. Since 1983, the Clean Water Act has

required that each state establish an ONRW or Tier 3 designation process.

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MR. BATES continued.

[Original punctuation provided.]

Alaska has a process in place, formalized in November 2018 in the form of a Department Policy and Procedure, that essentially reads the same as the bill - "The current process for nominating Tier 3 waters involves proposing the introduction of legislation to make the designation. Any such request may go to a legislative representative or committee for consideration for introduction as a legislative bill. Typically, a request to an individual legislator would go to a legislator whose district contains the proposed Tier 3 water."

Because the designation of a Tier 3 water carries with it the requirement to maintain and protect the water quality from degradation in perpetuity, the designation restricts a wide range of activities on the waters and adjacent areas, to include

- road and building construction
- recreational activities
- seafood processing
- municipal wastewater discharge and septic systems
- storm water discharge
- landfills
- gravel quarries
- large-scale resource development projects and or any other activity that might affect the designated water

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MR. BATES continued.

[Original punctuation provided.]

Such widespread impacts effectively make Tier 3 designation a de facto land and water use decision, one that may be based on designation criteria well outside the Department's expertise and authority. For illustration purposes, consider a Tier 3 nomination on any Special River as an example. A party could nominate that Special River for its exceptional recreational significance for its sportfishing opportunities. There is no doubt that this is a special river and watershed, and it should be managed accordingly, as all the agencies with expertise and management authority currently do. However, designation as a Tier 3 waterbody requires that the water quality on the Special River be maintained and protected in perpetuity for the reasons designated and for the water quality at the time of designation.

What that practically means is that no new or increased discharges to the river or its tributaries would be permitted if the discharges would result in lowering or degrading the water quality. That has potential long-term if not permanent adjacent and upstream land-use consequences - no new discharge contributions that lower or degrade water quality, whether those new discharges meet water quality standards or not. That would potentially eliminate road improvements in the area, increased or changed discharges from municipal wastewater treatment facilities, increased recreational opportunities, seafood processing, or anything else that might affect the water quality.

The designation of a Tier 3 water includes significant use restrictions and requires a substantial evaluation on the use of a waterbody that exceeds the Department's statutory authority.

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MR. BATES continued.

[Original punctuation provided.]

The Department has proposed this bill to formalize that the designation of Tier 3 waters would be accomplished, appropriately, by the legislature

through statute, and having that legislative process would provide two very important things:

1. A full and public process engaging all the interested and affected parties, including those communities, residents, users, developers, and conservationists, and also those agencies with oversight responsibilities for the area lands and waters; and
2. A full discussion on the consequences, restrictions, or impact to other activities and potential activities by the designation, including future and foreseeable activities.

[4:41:07 PM](#)

Providing for the designation of a Tier 3 water as structured in the bill will bring certainty to the process and would codify in statute a consistent practice for how lands and waters across the state would be designated for conservation by legislative approval rather than by division, department, or judicial discretion.

[4:41:49 PM](#)

SENATOR KIEHL asked whether the courts have created a Tier 3 designation in the absence of a structure or framework.

MR. BATES said he was unaware of any judicial decision. He explained that DEC's Tier 3 decisions could potentially be litigated. DEC would prefer to have land use decisions made by the legislature, not have them made by an agency or the courts.

SENATOR KIEHL said he understood the arguments about impacts on adjacent lands, but these are not land use decisions but are water quality decisions under the Clean Water Act.

MR. BATES answered that the reasons for Tier 3 designations could go beyond simple water quality to recreational or ecological purposes. He referred to his earlier example of a special river, relating that a waterbody could be designated as Tier 3 because of its extraordinary fishery or the rafting opportunities. However, those reasons fall well outside the bounds of the expertise and authority of the Division of Water, which focuses on water quality.

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SENATOR KIEHL commented that it was an interesting dilemma. He offered his belief that the legislature provides various state agencies with significantly more authority than this. For example, DNR can sell land, which would impact land use. DOT&PF can construct a highway, creating significant rights-of-way. He said it always seems strange when a bill says the legislature can pass a bill.

[4:45:13 PM](#)

VICE CHAIR MICCICHE asked why the administration brought the bill to the legislature.

MR. BATES answered that DEC believes the legislature is the proper forum to consider the broader implications of Tier 3 designations. He emphasized that the Tier 3 designation locks in the water quality. This means there cannot be any increased contribution that would degrade water quality. Suppose there was a publicly-owned wastewater facility located upstream of a Tier 3 river. It would mean that the surrounding population cannot increase because it would increase the discharge from the publicly-owned utility and contribute some pollutants beyond the water quality classification of a Tier 3 river. It would also mean that recreational user opportunities could not be increased in the area. He opined that the Tier 3 designation has the potential to lock up waters and preserve them in perpetuity. He acknowledged that might be appropriate in some circumstances. Still, it is a major decision that would prevent and preclude the development of any other activity that would contribute to the degradation of the water quality of the Tier 3 river, even if the permitting process could mitigate the impacts. He emphasized that a Tier 3 designation means that the activity cannot degrade or contribute to water quality degradation of the Tier 3 waterbody.

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MR. BATES said DEC believes this goes beyond the bounds of DEC's authority, focus and discretion because it may require designating areas for subsistence, fishery, or recreational use and tread on another agency's authority. The legislature designates critical habitat areas, and that same process should be used for Tier 3 designations.

[4:48:25 PM](#)

SENATOR KIEHL related his understanding that temporary impacts to water resulting from building or improving roads were permitted and that roads have been improved through Tier 3 watersheds elsewhere in the country.

MR. BATES responded that temporary and de minimis activities are allowed so long as the activities do not contribute to poor water quality. Thus, temporary impacts related to road construction could be accommodated for short periods. However, if the road results in increased stormwater runoff or contributes to nonpoint source pollution, DEC could not permit the road building activity or construction of a mall at the end of the road.

[4:49:57 PM](#)

SENATOR KAWASAKI asked if Tier 3 designations could ever be amended or removed.

MR. BATES answered that he was unaware of a process to withdraw a designation. He related that his division had queried other states, and no one had attempted to do so.

SENATOR KAWASAKI commented that the dimensions of water bodies occur because of climate change. He asked how that would affect a Tier 3 designation.

MR. BATES acknowledged that was a fair point. He explained that the Division of Water only has the authority to control permitted activities and, to the extent it can, nonpoint source activities that contain material that enters the water bodies. He offered his view that if climate change impacts result in increased turbidity, DEC we need to develop a management plan to address it. For example, a highly sulfuric warm spring with a temperature of 104 degrees Fahrenheit could be designated as a Tier 3 waterbody. He was unsure how DEC would respond if the temperature increased to 108 degrees.

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VICE CHAIR MICCICHE stated that the committee previously discussed SB 227, which requests Section 404, Clean Water Act primacy. He wondered if this bill punts the issue to the legislature and how the legislature would handle Tier 3 determinations since DEC uses a science-based approach to make them.

MR. BATES offered his view that DEC has an exceptionally skilled, science-based staff that permits, evaluates, and mitigates water quality to avoid negative impacts and meet water quality standards to move projects forward. DEC conducts fieldwork and samples water throughout the state. He noted that DEC's website explains these activities. Instead of punting, DEC

would bring a level of expertise and science to the legislative process related to Tier 3 designations. However, Tier 3 designations carry an opportunity to adversely impact activities beyond water quality, such as fishery management, which fall outside their area of expertise. He said DEC would like to participate in the process related to water quality. He offered to expand his response to address Section 404 permits if desired.

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VICE CHAIR MICCICHE was unsure how the process would work under SB 228. He asked if the bill were to pass, how the legislature would make the Tier 3 determinations: if legislators would decide a water body should be designated and introduce a bill. He wondered if the goal was never to have an outstanding national resource waterbody.

4:57:17 PM

MR. BATES stated that if SB 228 were to pass, a legislator or a committee could introduce a bill on behalf of a constituent that would identify the boundaries of a special river as a Tier 3 waterbody and list the reasons, including a minimum amount of background information to support the request. This would mirror DEC's current process. He surmised that testimony would reveal the science, policy, and justification during the public process. For example, ADF&G could testify on matters related to fisheries management, DNR on navigability and allowable watercraft, DEC on water quality aspects, and landowners along the river would weigh in on resource development activities that could contribute to the river's water quality degradation. He characterized the legislative process as a robust one.

MR. BATES responded to Senator Micciche's question on how science affects Section 404 permitting, relating that DEC's staff is exceptionally skilled in evaluating, permitting, and conditioning projects. Under the Section 404 permitting process, DEC imposes jurisdictional determinations, and the US Corps of Engineers implements them. He related that to determine if the activity is in US waters as defined under federal law, DEC would evaluate the hydrology, flora, and fauna typically found in wetlands, which are considered waters of the US. He characterized the process DEC uses to determine whether the activity requires a Section 404 permit as a prescriptive scientific process.

5:00:34 PM

SENATOR BISHOP said suppose the administration or a legislator were to bring a bill forward to nominate a Tier 3 waterbody. Suppose the waterbody consisted of a 10-mile waterway connected to the Yukon River. He asked for an estimate of the cost to perform the background to bring a bill forward, noting that while the department has its experts, the legislature also has its experts.

MR. BATES offered to research this and report to the committee. However, the legislature currently considers bills ranging from simple to complex ones. He surmised that someone who would nominate a 10-mile stretch of water would likely compile several years of data and provide justification to support designating the river as Tier 3 to allow the legislature to make a rational decision. Under the current process, DEC would want to know why the Tier 3 designation was necessary, any associated costs, what outreach was done to assess development activities in the area, and what activities could be precluded to understand the consequences of the Tier 3 designation.

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SENATOR KIEHL said suppose a Tier 3 waterbody is somehow designated, but it shouldn't have been. He wondered whether it could be undesignated. He asked Mr. Bates to clarify that no other state has a process to de-designate a Tier 3 designation. He stated that three years ago, the Division of Water testified that the Environmental Protection Agency doesn't have any rules against it. EPA's correspondence to DEC indicated the agency didn't have any objections to having it delisted or de-designated. He asked whether there was any conflict or if both were accurate.

MR. BATES answered that he does not see any conflict. He said he is unaware another state has a de-designation process. He further responded that he was aware that EPA does not have a prohibition against de-designating a Tier 3 waterbody. He offered to follow up with the committee.

[5:05:28 PM](#)

VICE CHAIR MICCICHE opened public testimony SB 228.

[5:05:50 PM](#)

LINDSEY BLOOM, Campaign Strategist, SalmonState, Juneau, Alaska, spoke in opposition to SB 228. SalmonState is a nonprofit organization working throughout Alaska, focused on salmon and fishery conservation issues. She surmised from the questions asked that many committee members are familiar with the issues.

She stated that she had been part of that application in the past and was willing to discuss her experience.

MS. BLOOM stated that SalmonState believes that DEC has the authority and in-house expertise to process applications and use its highly skilled staff to review the criteria and determine whether the waterbody should be designated as Tier 3. She noted that DEC wants to punt this to the legislature and politicize the issue. Tier 3 designations should be based on a scientific process. She stated that requiring the legislature to designate the outstanding national resource waters is the wrong direction to go.

[5:08:10 PM](#)

SENATOR STEVENS said he is always concerned about water quality and protecting the environment. Still, he is also worried about imposing restrictions on industry, which could bring fisheries ashore instead of at sea. He asked whether some of these restrictions could damage the industry.

MS. BLOOM answered that she was not concerned. As Mr. Bates stated, there would be allowances for temporary and de minimis discharges to Tier 3 designated waterbodies. She said Bristol Bay is one of the fisheries she had participated in on the Naknek River. She suggested if that river were designated as a Tier 3 river, it would mean economic activity could not occur that would permanently impair the waterbody and affect seafood processors. She offered her belief that the fishing industry's discharges would fall within the temporary and de minimis category. She offered her view that the state should protect many salmon streams, so their water quality is not diminished and compromised because many of Alaska's coastal communities depend on these fisheries.

[5:10:04 PM](#)

SENATOR STEVENS wondered why Ms. Bloom was in opposition to SB 228.

MS. BLOOM responded that she opposes SB 228 because the agency has been negligent in its responsibility to process applications and make decisions on Tier 3 determinations. She related that she was specifically involved in a Tier 3 application for Solara Creek, a salmon-producing headwater in the Bristol Bay watershed that was nominated years ago. DEC rejected the application because DEC refused to create the process necessary to approve or deny these applications. She emphasized that the agency should focus on the scientific criteria, and if a nomination

meets the criteria, the waterbody should be protected and designated. She offered her belief that the process does not need additional layers of political and legislative debate because it does not serve Alaskans.

[5:11:53 PM](#)

AARON BRAKEL, Inside Passage Waters Program Manager, Southeast Alaska Conservation Council, Juneau, Alaska, spoke in opposition to having a legislative-only approach to designating Tier 3 waterbodies in SB 228.

MR. BRAKEL stated that the legislature could delegate its authority, which is appropriate in this instance. He clarified that he was not opposed to the legislature introducing a bill to designate a specific river or stream as outstanding national resource water. Still, there should be a scientific, community-based process to identify a waterbody as ONRW and go through a state and scientific process to designate the water.

MR. BRAKEL suggested that if this Division of Water director doesn't believe it's within his jurisdiction to designate ONRWs, perhaps the next one might. He stated that Alaskans don't always experience the Division of Water's permitting process the same way the director represents it. He expressed concern about the permitting process. For example, he reviewed a mining permit, where it was clear to him that the State of Alaska had stepped back and allowed a discharge of metals to continue. However, he offered his view that a scientific process can be used for Tier 3 designations. He urged members not to pass the bill.

[5:15:00 PM](#)

SENATOR BISHOP said he is a miner. He said he guarantees that DEC does not step back from the mining industry on the water quality going back into the streams.

[5:15:37 PM](#)

VICE CHAIR MICCICHE closed public testimony on SB 228.

VICE CHAIR MICCICHE held SB 228 in committee.

[5:16:28 PM](#)

There being no further business to come before the committee, Vice Chair Micciche adjourned the Senate Resources Standing Committee meeting at 5:16 p.m.